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## Towards Regimes for Sustainable Mineral Resource Management

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## PART 3

### *Social and Environmental Dynamics*





# Towards Regimes for Sustainable Mineral Resource Management—Constitutional Reform, Law and Judicial Decisions in Latin America

*Ana Elizabeth Bastida and Luis Bustos*

## Abstract

This chapter examines mining legislation trends in Latin America. It focuses on the interpretation of the judicial decisions of the Constitutional Court of Colombia regarding conditions and processes for decision-making in the context of mining projects. The authors present an initial overview of the economic organisation and the sector legislation model adopted in Bolivia. The chapter anticipates a shift from sectoral regimes, which focus on exploration and exploitation, towards regimes for decision-making processes that mainstream constitutional principles and legal frameworks that apply to managing territories and their natural resources. The emphasis lies on reflecting on gaps in legal and institutional design and on corresponding challenges. This includes the need to strengthen the capacities of institutions and the actors that participate in decision-making processes to advance efforts aimed at furthering sustainable mineral resource management in the region.

## 1 Introduction

The Sustainable Development Goals (SDGs) adopted by the United Nations General Assembly in September 2015 set the direction for the new global development agenda for 2030 and promote advancement towards ‘achiev[ing] the sustainable management and efficient use of natural resources’ (UN, 2015, SDG 12.2). The 1992 Rio Declaration on Environment and Development established the principle that human beings are at the centre of concerns with regard to sustainable development and called for public participation in decision-making processes (UN, 1992). Sustainable development entails obligations, limits and processes in natural resource management while balancing divergent environmental, social and economic interests when making decisions about economic activities. This encompasses an expansion of the historical dynamics of decision-making in industries (and challenges to the

traditional models of sector legislation) that focus on extraction. The process of weighing up different criteria requires applying both management and planning tools and creating spaces for participation and dialogue among different actors and institutions.

The question of the role and ownership of the state over natural resources and the establishment of the main criteria for their use and exploitation have played a preponderant role in the significant waves of constitutional reforms that have taken place in Latin America since the 1990s—natural resources are known to make a decisive contribution to the economies of many countries in the region. Aspects concerning the ownership of natural resources and the role of the state are usually included in the chapter of the constitution regarding the state's economic organisation and express broader economic and political views. One of the most important axes of the constitutional and legislative reforms of the 1990s in most Latin American countries aimed at setting the bases for market economies and opening up their regimes to international investment. But this was not the only axis. The other entailed strengthening the bases for the rule of law and expanding constitutional charters of rights and guarantees in the political context of opening up to democracy. The right to a healthy environment and the rights of indigenous peoples were recognised (many Latin American countries ratified Convention 169 of the International Labour Organization on Indigenous and Tribal Peoples in Independent Countries during this period), enshrining sustainable development as the guiding principle for natural resource management. At the same time, decentralisation processes, involving the transfer of functions from the central government to subnational political units, were furthered (Yupari, 2005). These trends are consistent with, and in some cases have been driven by, intergovernmental organisations, the World Bank in particular, in the context of reform programmes for consolidating the rule of law.

In recent years, several countries—driven in part by the economic boom seen in the region due to the unprecedented demand from China and other industrialising countries for raw materials—have experimented with more heterodox policies, where the state plays a larger role in the economy. In some cases, and particularly in Bolivia and Ecuador, changes transcend the economic sphere and acquire re-foundational characteristics, which are expressed in constitutional reforms. In effect, the constitutions of Bolivia and Ecuador have aligned their structures and the state's functions with 'living well'/'good living' (*vivir bien/buen vivir*). This concept is rooted in the pluricultural identity of each of these countries, and draws a close connection between man and nature (Vanhulst and Beling, 2014; Villalba, 2013). Although these processes have been considered alternative forms of development—given that they

are critical of the Eurocentric view of development—(Acosta, 2010; Escobar, 2015), both constitutions and sectoral legislation incorporate the concept of the sustainable development of natural resources and the more limited term ‘sustainable use’ as qualifying non-renewable resource extraction.

Mining laws in the region are deeply rooted in history. A common characteristic is that the state holds ownership of mineral resources in the subsoil and grants exploration and exploitation rights through the so-called concession system. Mining has traditionally been considered an activity of public utility or public interest—a principle grounded either in ensuring mineral supply as minerals are used as basic inputs for the economy, or in the assumption that mining can contribute to development. The declaration of the public utility of mining expresses the precedence of mineral rights over surface rights, through the mineral rights holder’s entitlement to demand expropriation or easements. In this sense, mining legislation establishes preferential land use and a model of territorial management that aims to promote and facilitate mining activities.

The question is to what extent sectoral legislation—aligned with multiple legal and regulatory regimes and constitutional principles—sets the bases for the sustainable management of mineral resources and for promoting the role that mining can play in contributing to the objectives of sustainable development.

First, our goal is to examine two different approaches to sectoral legislation, taking into consideration the differentiation drawn by the editorial line of this thematic issue, which focuses on the orthodox or heterodox nature of the strategies that have been adopted by countries in the region in the past few years. Second, our objective is to examine legislative and judicial developments, exploring their scope and the criteria used to align sectoral legislation and constitutional principles. Our analysis focuses on Colombia, poses a series of questions regarding Bolivia and comments on aspects relevant to the region. On the one hand, Colombia exemplifies the model of economic management based on market policies. On the other hand, various issues relative to sustainable development in mining have been subject to interpretation by the Constitutional Court—including the final purpose of the revenues generated from non-renewable resources, banning mining from ecologically sensitive areas, and the range of actors involved in the decision-making process. The court is recognised in the region for the harmonious interpretation of economic clauses and of the charter of rights and guarantees as enshrined in the constitution of 1991 with regard to the enforceability of social and environmental rights (Uprimny Yepes, 2006; see also Couso, 2006). In the case of Bolivia, it has adopted a mixed system of economic management and has also

instituted heterodox approaches with respect to the liberal notions of democracy, participation and governance (Wolff, 2013).

Lastly, our objective is to explore the evolutionary direction of law in this area, from sectoral regimes that promote extraction to broader normative frameworks that support sustainable resource management, and their contribution to the objectives of sustainable development. Additionally, we seek to delineate contextualised resource management models and point out the enormous complexity and challenges that are involved in effectively ordering and regulating the sustainable development of mineral resources in the region (UN, 2015, SDG 12.2). Our analysis aims to contribute to debate and to the work of the Economic Commission for Latin America and the Caribbean (ECLAC) regarding a recent regional initiative relative to Natural Resource Governance in Latin America, launched in response to the first report on the Sustainable Development Goals in 2016 (ECLAC, 2016).

Regarding the structure and some of the conceptual bases of this chapter, the next section describes some of the structural features of systems used to grant rights over mineral resources in the region and provides a dynamic perspective on their evolution in different political and economic contexts. This also serves as the basis for describing sectoral regimes in the countries analysed. Next, we examine the concept of sustainable development and its application in mining according to the United Nations' documents and resolutions, and we point to literature on the role of law in sustainable development (due to space constraints, we will not delve into critical literature regarding the notion of development and sustainable development).

As a tool with which to analyse the frequent fragmentation of regimes applicable to economic, environmental and other matters relative to sustainable natural resource management, we rely on the reflections of the distinguished jurist Raúl Brañes. Brañes foresaw the need to align the 'parallel legal subsystems' that exist in Latin America in terms of economic and environmental management with the purpose of achieving the shared objective of sustainable development. In a piece written a number of years ago, he contended that one of the factors that has contributed to problems of application and to the inefficiency of environmental law in the region has been 'the absence of sustainable development concepts in the legal system in general and in economic legislation in particular' (Brañes, ca. 2004). It is not our intention to go into a detailed analysis of normative frameworks or to inquire about the consequences that this lack of harmonisation generates within different branches of legislation. Instead, we explore the presence of sustainable development in sector legislation. These reflections provide us with a useful starting point for a retrospective analysis of the evolution of the integration of different

dimensions of sustainable development in those regimes that apply to mining activities.

At the end of our analysis of each country, we anchor our reflections to some lines of the literature in order to advance understanding of the context and the limits of the legal framework. Lastly, if the focus of mining legislation has traditionally been on exercising the *rights* that emanate from territorial sovereignty and on the relationship between the state and the miner (investor), sustainable development—as a final objective of and condition for resource exploitation—shines a light on the *duties* of the state in managing said resources and in expanding the constellation of actors and levels of jurisdiction involved. Along these lines, at the end of the chapter we situate our reflections as a facet of internal law in the context of the international literature and debates regarding states' exercise of sovereignty over natural resources.

## 2      Structural and Dynamic Perspectives in Sectoral Legislation Regarding Mining in Latin America<sup>1</sup>

In line with the predominant system in Latin America, states exert ownership over the mineral resources in the ground. Juristic writings usually differentiate, using nuances, between two systems for granting exploration rights to extract mineral resources. On the one hand, there is the 'legal concession' system or 'concession-property'. This is the legacy of the old ordinances that were in place during the viceroyalty periods until the countries of the region declared their independence (such as the Ordinances of New Spain–Mexico of 1783,<sup>2</sup> which were in place until the first codes of the new countries came into effect).<sup>3</sup> According to this system, the concession is granted to the discoverer (in recent codes this is the 'first applicant') in accordance with objective criteria and non-discretionary procedures and for an undefined period as long as the conditions necessary to grant and maintain the same are fulfilled. On the

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1 As a reference with which to structure this section, we have used the categorisation drawn up by Viñuales (2015), which differentiates between structural and dynamic perspectives when examining specific branches of the law.

2 Reales Ordenanzas para la Dirección, Rejimen y Gobierno del Importante Cuerpo de la Minería de Nueva-España y de su Real Tribunal Jeneral de orden de Su Majestad (1783). For an in-depth study of Ordinances, see Vergara Blanco (1992) and Vildósola Fuenzalida (1999).

3 In Chile, the ordinances were in effect until 1874; in Mexico, until 1884; in Argentina, until 1886.



other hand, there is the 'concession-contract' system (influenced by European mining laws, particularly the French mining law of 1810, which also served as material sources in the drafting of the first generation of sectoral legislation in the independent countries of the continent), according to which the concession is granted to the applicant *intuitu personae* as long as the same fulfils the required conditions (which may include standards relative to their technical, economic and financial capacity), and is then formalised into a contract. Apart from concession systems, the state can opt for directly contracting joint ventures, service contracts, services, or shared risk contracts.

From a dynamic perspective, and given the role of mining in the economic organisation of many of the countries in the region, the legal and regulatory regimes adopted in the sector can be interpreted through visions of the role of the state and foreign investment in the economy and in predominant political-economic contexts or models of development (Bastida, 2008). The changing scenarios at the international level in terms of prices and demand for minerals has also had an impact on the formulation of strategies in the sector, taking into consideration the fact that Latin America has historically followed a pattern of raw material exports. In the 1960s and 1970s, in the conceptual framework of the theory of dependence, most Latin American countries implemented policies whereby the state took a leading and assertive role in exercising its economic sovereignty with regard to natural resource exploitation in a context of rising commodity prices. The prevailing notion was that mining could contribute the financial resources needed for development, and thus become a 'springboard to industrialisation'. The initial measures employed to ensure the gradual transfer of shares in companies with transnational capital were followed by outright nationalisations (as with the Chuquicamata and El Teniente deposits in Chile). State companies were created to administer these resources (Codelco in Chile, COMIBOL in Bolivia, and Empresa Pública Minera del Perú, or Minero-Perú). The central state was the main player in this model. In terms of legal instruments, the historic pre-eminence of the mining concession system in the region ('concession-property') paved the way for more regulated regimes of mineral tenure (such as the administrative concession system under the General Law of Mining of Peru (1971)) and the predominant use of service and joint venture contracts (Cano, 1977). In this context, Latin American countries played a leading role in the initial articulation, and in the evolution, of the principle of permanent sovereignty over natural resources within the heart of the United Nations.

Towards the end of the 1980s and during the 1990s, in the context of globalisation and low commodity prices and following a decade of increased levels of foreign borrowing, Latin American countries registered a massive shift towards

market policies, opening up to foreign investment and liberalisation. According to the ‘Washington Consensus’—initially directed at Latin America—these policies needed to be implemented prior to accessing financing. At a domestic level, the reforms were directed at generating financial resources and paying the external debt by launching new projects and privatising state-owned mining companies. The legal map of the sector in the region showed the return of traditional mining concessions regimes. Emphasis was placed on objective processes for granting and maintaining concessions (to the first applicant under the condition that that applicant pay an initial/annual amount), strengthening the status of rights emerging from concessions as real property and legal certainty, limitations on the exercise of discretionary powers, and streamlining procedures in order to ‘establish enabling environments for investment’ (Van der Veen et al., 1996; Bastida, 2008). In the field of investment law, many countries in the region ratified bilateral investment agreements and reformed their laws to promote and protect foreign investment, which implies recourse to international arbitration for settling conflicts between investors and states. Foreign investment regimes entail another ‘parallel legal sub-system’ of economic law that prioritises the protection of investors’ interests—but that sub-system’s interface with development outcomes and the public interest is coming under increasing scrutiny (Viñuales, 2015).

Since investment regimes opened up in the 1990s, Latin America has become a major recipient of international investment. It is important to note that in the last few decades the technical modalities of mining operations have been transformed by technology, which has made open-pit exploitation feasible—84 per cent of metal mines operate using this method—and uses chemical substances in its ore recovery processes. While fiscal revenues can provide a powerful injection of revenues and currency into national economies, the interaction of these projects with the environment, communities and local economies has frequently been profoundly problematic. In most cases, regulatory and institutional gaps have amplified the impacts, conflicts and growing opposition to such projects.

While the focus of sector policies in the 1990s was on establishing enabling frameworks for investment, in the next decade attention turned to concerns about how to strengthen institutions in resource producing countries to avoid the so-called resource curse. The current decade has been marked by debate about the potential transformative role that mining could play if linkages with other productive sectors were strengthened (Dietsche, 2014). Such an evolution calls for certain clarifications regarding the remarkable evolution of the concept of sustainable development in terms of its application to mining and minerals, which will be dealt with briefly in the next section.

### 3 Sustainable Development and Its Application in Mining: The Focus of Documents Issuing from the United Nations

*Our Common Future* (the Brundtland Report), published in 1987, contained a call to overcome the fragmented vision that saw development and the environment as separate, and coined the concept of sustainable development, which it defined as development that meets the needs of the present generation without compromising the ability of future generations to satisfy their own needs. On the one hand, the concept places emphasis on *needs*, particularly those of the most vulnerable; on the other, it posits that there are limits to the environment's capacity to meet present and future needs (UN, 1987). In a broad sense, the concept brings forward an ethical appraisal of the purpose and processes of development (Walsh, 2000).

The instruments developed at the United Nations Conference on the Environment and Development (UNCED) in Rio de Janeiro in 1992 consolidated the trends initiated in the Stockholm Declaration of 1972 and set the guiding principles for environmental law and the concepts inherent to the notion of sustainable development. While UNCED's main concern related to balancing environmental protection and economic development, the World Summit on Sustainable Development held in Johannesburg in 2002 emphasised the social dimension. The United Nations Conference on Sustainable Development (Rio+20), held in 2012, urged to focus their efforts on integrating, and ensuring more coherence among, the dimensions of sustainable development and its supporting policies and institutions, and stressed the need to eradicate poverty and radically shift consumption and production patterns. It also called for the Sustainable Development Goals (SDGs) to be elaborated in such a manner as to subsume the Millennium Development Goals, due in 2015, and to consolidate a new development agenda post-2015. The SDGs were approved in September 2015.

The question is whether it is possible to reconcile mining with sustainable development. In the 1970s, the focus of the debate on non-renewable resources was dominated by concern that they would run out. As time went on, these concerns shifted to the environmental impacts generated by mining (Tilton, 2003). The idea that mining can be a catalyst for the objectives of sustainable development is supported by the concept of 'capital substitution' developed in the economic literature. The term 'capital' comprises all inputs of economic activity, including natural capital, human capital, financial and manufacturing capital, social capital and cultural capital (Auty and Mikesell, 1998; Eggert, 2000; Harris, 2001). There is an increased consensus on the fact that certain forms of capital are not substitutable. The Johannesburg Plan of

Implementation of 2002 advances conceptually with regard to the relationship between mining and sustainable development. It reflects debates positing that rather than focusing solely on ‘sustainable mining’, it is more appropriate to consider mining’s potential contributions to sustainable development. *The Future We Want*, the outcome document of Rio+20 (UN, 2012), goes further in this direction as it establishes that ‘mining offers the opportunity to catalyze broad-based economic development, reduce poverty and assist countries in meeting internationally agreed development [...]. [W]hen managed effectively and properly [...] mining activities should maximize social and economic benefits, as well as effectively address negative environmental and social impacts’. The document continues: ‘In this regard, we recognize that governments need strong capacities to develop, manage and regulate their mining industries, in the interest of sustainable development’ (UN, 2012, para. 227). The SDGs have significant implications for mining although no explicit references are made to the activity (CCSI et al., 2016) and Goal 12.2 aims at achieving ‘sustainable management and efficient use natural resources’ by 2030. There is considerable debate at the international level regarding the manner in which mining activity—and public and private capital invested in the same—can contribute to financing the SDGs. In Latin America, ECLAC has launched a position paper to consolidate a new governance approach to natural resources in the region. The starting point is the difficulties encountered, during the boom decade, in reinvesting part of the economic benefits reaped in long-term strategies, human capital, or in diversifying economic activity (ECLAC, 2016).

Paragraph 228 of *The Future We Want* emphasises the role of law and policies in facilitating the economic and social contributions of mining and establishing safeguards that aim to reduce environmental and social impacts, conserving biodiversity and ecosystems well beyond mine closure. It also urges governments and companies to promote transparency and accountability, and existing mechanisms to work to prevent illegal financial flows from mining activities.

According to the Rio Declaration, the concept of sustainable development comprises substantive elements (integrating the environmental dimension into the development process; the right to development; sustainable use of natural resources; and intra- and intergenerational equity) and also procedural elements (public participation, access to information, environmental impact assessments (EIA) and cooperation, whose objective is to legitimise and enhance decisions). Birnie, Boyle and Redgwell contend that international law undoubtedly demands that development decisions be the outcomes of a process that promotes sustainable development (Birnie et al., 2009, 126–127). Sustainable development is a process that requires reconciling three dimensions

of decision-making regarding development policies and projects: environmental protection, social development and economic development. Sustainable development also entails effective institutions with efficient, transparent and participative structures as a *sine qua non* to achieving its objectives. It has also been noted that sustainable development is a transversal method of thinking about the law, and that it articulates a range of normative *corpora* (Walsh, 2000).

The concept is broad, flexible, but rather ambiguous. The next section analyses sector legislation and the evolution of judicial decisions relative to some elements of the concept of sustainable development in Colombia.

#### 4 Colombia: Mining and Sustainable Development in Legislation and Judicial Decisions<sup>4</sup>

Over the past two decades Colombia has been applying multiple regulatory and institutional reforms to promote the extractive sector. Bolstered by a global economic cycle favourable for commodities, the sector has gained a significant share in the country's economy, which has traditionally been rooted in agriculture or coffee. In the field of mining, coal, gold and emeralds have historically captured the world's attention (Velasquez, 2013, 2014). The Code of Mines adopted by Law 685 of 2001 played an important role in the strategy to promote and attract national and international investment. The code is based

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4 We note that both the Political Constitution of Chile of 1980 and the Political Constitution of Peru of 1993 enshrined the principles of economic freedom, national treatment, protection of private property and guarantees of compensation in the case of expropriation (prior cash payment) and stipulated that the state can conduct business activities if previously authorised by law (with a qualified quorum in the case of Chile). Article 19, Section 24 of the constitution of Chile proclaims ownership, by the state, of mines and states guidelines for their concession, indicating that the same are established by the Constitutional Organic Law. The Constitutional Organic Law on Mining Concessions that was subsequently passed, and the Mining Code of 1983, establishes a 'concession-property' regime whereby the concession is granted to the first applicant under the condition of an annual payment through a judicial process. The evolution of this question was similar in Peru. Following the Law to Promote Foreign Investment, of 1991, and the new constitution of 1993, Peru promoted legal and structural tax reforms to create the bases and incentives for foreign investment while implementing a programme to privatise state companies. The Revised Single Text of the General Mining Law of 1992 adopted a mining concession regime—which exhibits similar features to the one in place in Chile—but whereby concessions are granted by an administrative authority.

on the principles of the public utility and social interest of mining and has adopted a 'concession-contract' for granting mineral rights. Colombia has signed and ratified various bilateral agreements to promote and protect investment, and a number of free trade agreements.<sup>5</sup>

The National Development Plan for 2010–14 placed special emphasis on supporting a coherent and integrated energy and mining policy. The plan's priorities included promoting both domestic and foreign investment in the mining and energy sectors and establishing environmental regulatory policies, and it focused specifically on transparency and preventing negative macro-economic effects. The plan considered the need to strengthen efforts to create clusters for services and goods that add value to the economy of the country and its regions (Mancero and Montoya, 2012). The National Development Plan 2014–18, adopted in 2015,<sup>6</sup> establishes 'strategic areas reserved for mining', which will be identified by the National Mining Authority (ANM), classified according to their high mineral potential and the minerals that are considered as being of 'strategic interest' for the country. The system for granting rights to these areas is differentiated from the regime established in the Code of Mines. It is based on Special Exploration and Exploitation Contracts, to be regulated by the national government and to which specific rules and obligations might apply. The Ministry of Environment and Sustainable Development is expected to collaborate in this process.

In terms of mining institutions, the Ministry of Mines and the ANM are responsible for entering into, and monitoring, mining concession contracts. In environmental affairs, the National Agency for Environmental Licenses (ANLA) and some autonomous, regional corporations oversee the issuance of environmental permits and licenses to exploit mining resources and are responsible for monitoring and enforcement. Some of these institutions have

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5 The bilateral investment agreements include those struck with China and the United Kingdom; additionally, Colombia is a member of the World Trade Organization and of the Andean Community of Nations. It is also party to free trade agreements with the European Union, Canada, the Northern Triangle, Chile, the United States and Mexico (OAS, 2015).

6 The plan is directed at 'building a peaceful, equitable and educated Colombia in harmony with the objectives of the national government, with best practices and international standards and with a vision for long-term planning as foreseen in the objectives of sustainable development' (Colombia, 2015, our transl.). In terms of mining, it establishes additional requirements to prove the economic capacity to grant mining titles and assign rights and areas. It also includes incorporating the obligation to develop and execute social management plans as part of the concession contracts to be entered into once this law enters into force.

responsibilities at the project level as determined by rules for territorial jurisdiction, products and export volumes.<sup>7</sup>

The Political Constitution of Colombia of 1991 states that Colombia is a 'social state under the rule of law, organized in the form of a unitary decentralized Republic, with autonomous territorial entities. It is democratic, participative and pluralist...' (Colombia, 1991, Art. 1). The constitution sets the bases for the regulatory role of the state in a 'social market economy' for the free exercise of economic activity and entrepreneurship and guarantees private property (which is considered as a social function with an inherent ecological function). It has been observed that the constitution introduced transformational changes into the legal as well as the political and economic structure of the country in a context marked by centralism, conflict and inequality. These changes included the principles of a unitary state and territorial autonomy, which have drawn a new 'territorial morphology', and the creation of the Constitutional Court to uphold the extensive charter of rights and guarantees (Robledo Silva, 2016).

The constitution established the bases of a development model that placed emphasis on using natural resources within the conceptual framework and the principles of sustainable development—with a focus on the treatment of non-renewable natural resources.<sup>8</sup> The state's recognition of the ownership of non-renewable natural resources is framed within the general provisions for the bases of the economic regime (title XII). The mandate for developing subsoil resources is based on the objectives set in Article 334, which deals with improving the quality of life of citizens and equitably distributing the opportunities and benefits of development as well as preserving a healthy environment. To accomplish this, the exploitation of these resources should accrue revenues for the state that must be distributed, controlled and earmarked for specific purposes.<sup>9</sup> Article 360 includes a mandate to determine by law the

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7 Other institutions are in charge of planning in the sector and its development from a geoscientific point of view: the Colombian Geological Service and the Energy and Mining Planning Unit. The activities of these two State entities support the decisions made with regard to the mining sector in the Ministry of Mines and Energy (UPME, 2015).

8 Intervention of the Mining and Energy Department of the Universidad Externado de Colombia with reference to judgment C-619/15 on 30 September 2015 (not published).

9 In this regard, article 360 indicates that: 'The exploitation of a non-renewable natural resource shall give rise to an economic offset in the form of concession fees (*regalía*) for the benefit of the State, without prejudice to any other right or compensation which might be agreed upon'. The Law will determine the conditions that govern non-renewable resource exploitation. At the government's initiative by means of another law, the law will determine the distribution, objectives, purposes, administration, execution, control, efficient use and

conditions for the exploitation of non-renewable natural resources as well as the rights of the territorial entities over them and establishes a royalty as an economic consideration for their exploitation.

The Constitutional Court has ruled that the purpose of revenues accrued to the state from the exploitation of non-renewable resources is to finance the social, economic and environmental development of territorial entities and to fund physical investment in education, science, technology and innovation, among other areas. This is aligned with the declaration that mining is of public and social utility, as enshrined in the Code of Mines (judgment C-395 of 2012).<sup>10</sup> Judgement C-1071 of 2003 interprets that royalties are grounded in both economic reasons (as a consideration for exploiting an asset owned by the state) and ecological reasons: 'to correct and compensate for some of the negative externalities generated as a result of the exploitation of non-renewable resources'.<sup>11</sup>

The Colombian constitution acknowledges the right of all individuals to a healthy environment as well as the right of communities to participate in decisions that affect them (Art. 79). The constitution sets a clear mandate for the state in terms of planning to manage and use natural resources in a way that 'to guarantee their sustainable development, conservation, restoration, or replacement' (Art. 80).

The Code of Mines stipulates that promoting the exploration and development of mineral resources constitutes a matter of public interest and indicates that the same should be aligned with the principles and norms of the rational

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destination of revenues from the exploitation of non-renewable natural resources, specifying the conditions that govern the participation of the recipients. This set of revenues, allocations, bodies, procedures and regulations constitute the General System of Royalties.

10 Article 361 stipulates that the revenues 'shall be used for the financing of projects for the social, economic and ecological development of the territorial entities; for savings to meet their pension obligations; for material investments in education and investments in science, technology and innovation; for generating public savings; for the control of the exploration and exploitation of deposits and the study and geological mapping of the subsoil; and for increasing the general competitiveness of the economy in the attempt to improve the social conditions of the population' (Colombia, 1991).

11 Ruling Judgment C-1071 of 2003: 'In economic and geological terms, the royalties that the State can charge for the exploitation of private resources are based on the need to correct and compensate for some of the negative externalities that result from the exploitation of non-renewable resources. In addition to the aforementioned, the rationale for royalties that private parties pay for the exploitation of State resources may have an additional foundation which is constitutionally admissible, which is the requirement to pay compensation for the exploitation of State property' (our transl.).



exploitation of non-renewable natural resources within the comprehensive concept of sustainable development (Art. 1). In a more direct reference, Article 194 establishes that '[the] duty to adequately manage renewable natural resources and the integrity and enjoyment of the environment are compatible and concurrent with the need to promote and rationally develop the use of mineral resources as basic components of the national economy and social well-being. This principle encourages the adoption and application of regulations, measures and decisions that regulate the interaction of two types of activity, which are equally defined by the law as *of public utility and social interest*' (emphasis added, our transl.).

#### 4.1 *The Environmental Dimension*

In environmental matters, the Colombian legal system contains multiple norms that regulate mining activities and set conditions as to the rights derived from concessions. The obligations outlined in the Code of Mines should be interpreted in a manner that considers other legal and regulatory norms pertaining to this activity, such as Law 99 of 1993, which requires the issuing of environmental licenses as a condition to exercising rights.<sup>12</sup> The Constitutional Court, in its judgement C-891-2002, sets forth that 'Article 59 requires the concessionaire to meet legal, technical, operational and environmental obligations when exercising concession rights'.<sup>13</sup>

While the mining authority is responsible for assessing a project's technical and economic feasibility, the environmental authority evaluates its social and environmental feasibility throughout the mining cycle. This is a significant challenge for the authorities, given that effective protection and adequate natural resource development will ultimately depend on a process of coordination.<sup>14</sup>

Likewise, a set of norms—namely, the National System of Protected Areas (created through Decree 2372 of 2010) and Law 1450 of 2011 exclude areas

12 Intervention, Department of Mining and Energy of the Universidad Externado de Colombia with reference to Judgement C-619/15 of 30 September 2015 (not published).

13 The Judgement states: 'In relation to the last of these reasons, it would be absurd to sustain a contrary position, as it would lead one to include in the different legal regimes, regardless of the subject-matter, the list of constitutional mandates applicable to each specific case (e.g. abide by the Constitution and the law, respect and obey authorities, protect the cultural and natural wealth of the Nation, respect the life of others, do not discriminate against anyone, act in good faith, etc.). Obviously, such interpretation undermines the principles of hermeneutics, legal theory and legislative techniques among others' (our transl.).

14 Intervention, Department of Mining and Energy and Environmental Law of the Universidad Externado of Colombia regarding File D-11172—Constitutional Court (not published).

from mining due to their ecological importance. The purpose of this is to protect these areas, which include regional national parks, moorlands, the Ramsar wetlands and protected forest reserves (Alvarez, 2011; SINAP, 2015; Ricaurte, 2013).<sup>15</sup>

The National Development Plan 2014–18 also establishes a rule for territorial ordering, as it bans areas that are classified as moorlands or wetlands from being declared as reserves for mining development—except if authorisations had been granted prior to 16 June 2011 in the case of hydrocarbon activity and prior to 9 February 2010 in the case of mining activities that have been granted a contract and an environmental license or an equivalent instrument for environmental monitoring and management.<sup>16</sup> In Judgement C-035 of 2016, the Constitutional Court upheld a claim that challenged the constitutionality of the sections of the National Development Plan that backed mining and hydrocarbon exploitation with permits that had previously been issued for moorlands, as these activities would cause negative and irreversible consequences for the country's ecosystems, which are paramount to the safeguarding of the planet's water and oxygen. The Constitutional Court ruled that the right to a healthy environment prevails over rights acquired through mining rights and endorsed by environmental permits.

#### 4.2 *Ethnic Communities: Rights of Preference and Prior Consultation as Fundamental Rights*

The Code of Mines crystallises the rights recognised in the constitution,<sup>17</sup> and establishes ethnic communities' priority with regard to granting mining concessions within areas that are delimited as 'indigenous mining areas' or 'black communities' mining areas' (Articles 124 and 133). If the priority is not exercised, the code establishes the obligation to provide for such communities' protection and participation and for the principle of cultural integrity, as set

15 Intervention, Department of Mining and Energy of the Universidad Externado de Colombia regarding ruling C-619/15 of 30 September 2015 (not published).

16 According to the Mechanisms for Moorlands Information (MIP), an initiative of the Consortium for Sustainable Development of the Andean Moorlands (CONDESAN), in the framework of the Andean Moorlands Projects (PPA), a moorland is a 'tropical ecosystem in the mountains that develops on top of a forest and extends to the perpetual snow. In the Andes, the moorlands are extend from the Merida Range and cross through the mountainous chains of Colombia and Ecuador until the Huancabamba Depression (Peru)' (our transl.).

17 See the extensive and detailed analysis of legislation and jurisprudence on this matter in Henao and Gonzalez Espinosa (2016) and DPLF and Oxfam (2011).

forth in Chapter XIV of the code. Artisanal mining in Chocó, for example, has traditionally been carried out within black communities' councils (*consejos*) in accordance with rules of allocation, and refrains from using chemical substances in the recovery process. Practices have been streamlined with environmental and social practices agreed upon with civil society organisations. In the case of operations certified by the Oro Verde programme through the Fair Trade, Fair Mined label, miners obtain a premium on their production (Moya Mena, 2016). In terms of exercising indigenous and afro-descendant communities' right to free, prior and informed consultation, the set of norms and principles known by Colombian jurisprudence as the 'constitutionality block' has recognised the same as a fundamental right and has reinforced the state's duty to provide guarantees and protection. These norms include constitutional principles, Convention 169—which was included in the domestic legal system through Law 21 of 1991, laws such as Law 99 of 1993, and the judicial decisions of the Constitutional Court (see judgements C-030/08 and C-461/08 among others). Judicial decisions tend to expand the margins of protection of ethnic communities (Suarez Ricaurte, 2016), and the obligation to conduct prior consultation, which is clearly established in legislation for the exploitation stage and in some cases also for the exploration stage (Rodríguez, 2014). The standard of protection demanded of mining projects is high given the characteristics of this activity and its impact on territories. At this point, the trend seems to be moving towards requiring consultation, at least in some cases, to obtain consent. In effect, the theory of prior consultation as a means of obtaining free, prior and informed consent has been applied by the Court in two cases relative to mining projects, out of the three to which this standard has been applied (judgement T-769 of 2009 and T-129 of 2011; Suárez Ricaurte, 2016).

Despite developments in judicial decisions, the literature points to delays from the executive and legislative powers—which are those responsible for establishing models for natural resource development, management and planning—in their advance towards the mandatory and binding enforcement of prior consultation. Measures should include strengthening institutional guarantees to indigenous communities to effectively protect their rights, and establishing public policies to improve their quality of life, thereby coordinating the relevant powers of public authorities (Suarez Ricaurte, 2016; Moya Mena, 2016; Hurtado Mora, 2016). Suarez Ricaurte (2016) observes that the mechanism for prior consultation is ultimately an avenue for intercultural dialogue. Whenever absent, it prompts persistent judicial conflict involving companies or state entities with investment projects located in the ancestral territories of ethnic communities.

### 4.3 *Territorial Management and Local Competences*

The participation of territorial entities in land-use decisions with regard to mining has prompted significant debate in Colombia.<sup>18</sup> The spectrum of the debate is very broad, reflecting the tension between the principle of a unitary state and the principle of territorial autonomy. In several judgements, the Constitutional Court has considered the constitutionality of Article 37 of the Code of Mines, and dealt with the competence of regional, sectional or local authorities to temporarily or permanently ban mining from zones of the territory. We will now look more closely at three of these judgements to provide an insight into this important debate.

The first, judgement C-123-14, considered that Article 37 of the Code of Mines disproportionately restricts local autonomy and land use, thereby infringing the concept of local autonomy. On those grounds, the Court ruled that the constitutionality of Article 37 is subject to guaranteeing municipalities and districts a reasonable level of participation in the decision-making process regarding the authorisation of mining activities. In connection with the concept of 'reasonable participation', the Court decided that in the process of the authorisation of mining activities, the state should coordinate with municipal authorities through agreements, particularly with regard to protecting watersheds, the health of the population and the economic, social and cultural development of its communities by applying the principles of coordination, concurrence and subsidiarity. The judgement also mandated the development of processes and instruments of coordination. Although this decision provided sufficient grounds for the participation of territorial entities, it did not settle the underlying problem of the instrumentalisation of 'reasonable participation' (Colombia, 2016a).

The second judgement is judgement C-273/16 of the Constitutional Court, which once again deals with a claim challenging the constitutionality of Article 37 of the Code of Mines—in this case on procedural grounds. The claim argued that this Article ran contrary to Articles 151 and 288 of the Political Constitution of Colombia, which place limits on the exercise of legislative activities and establish a special procedure to enact laws with regard to aspects that demand legislators ponder two diverging legal rights. In other words, the claim questioned Article 37 as it entered into the Colombian legal system as an ordinary law and not as an organic law, which would require more rigorous procedures (absolute majorities) as they deal with highly sensitive issues for society.

The Constitutional Court indicated that the 'reserve of organic law constitutes a mechanism that empowers the legislator to ponder diverging legal

18 Regarding the trend towards decentralisation in Colombia, see Yupari (2005).

rights based on the principles of subsidiarity, concurrence and coordination...'; and thus, considering the final objective of guaranteeing more stability in the distribution of powers and strengthening the democratic process of decision-making by mandating absolute majorities for the approval of this type of law, the Court declared Article 37 of Law 685 of 2001 unconstitutional.

The third judgement, T-445/16 of the Constitutional Court, reaffirms the reasoning of judgement C-273/16. Ruling on the popular consultation proposed by the municipality of Pijao in the department of Quindío, the judgement signals an important departure from the prerogative of decision over subsoil resources traditionally granted at a central level, as it clearly acknowledges powers to territorial entities to approve mining exploitation in their territories.

In conclusion, by means of these judgements, Colombia has apparently granted powers to regional, sectional and local authorities to define and subsequently exclude areas of the national territory from mining. This does not mean that in the future the national government will not decide to regulate this issue through an organic law that fulfils the requirements set by the Constitutional Court, thus attempting once again to empower central government.

#### 4.4 *Declaration of the Public Utility and Social Interest of the Mining Industry*

Article 13 of the Mining Code stipulates that '[in] reference to article 58 of the Political Constitution, the mining industry in all of its branches and phases is recognised as of public utility and social interest. As such, at the request of the interested party and through the procedures established in this code, it is possible to decree expropriations of immovable properties and other rights over the same where necessary to execute and efficiently develop a project' (our transl.).

As a corollary to the aforementioned debates, a recent claim challenged the constitutionality of the declaration of the public utility of mining established under Article 13 of the Code of Mines. It contended that this classification—which was categorised as 'supra-inclusive' inasmuch as it refers to 'all of [the] branches and phases' of the industry—confers privileges to this sector, and offers it disproportionate advantages over other sectors of the economy that are equally as legitimate, and should have legal rights that enjoy special protection under the constitution.<sup>19</sup> The claim also argued that this declaration of public utility makes possible the automatic allocation of real estate properties,

19 Constitutional Court Judgement, C-619 of 30 September 2015; M.P. Gloria Stella Ortiz Delgado; plaintiffs: Cesar Rodriguez Garavito, Beatriz Botero Arcila and Camila Soto Mourraile.

which might otherwise fulfil important environmental functions (for example, protecting water and agricultural resources or conserving natural resources), to mining, thereby impeding property from fulfilling the ecological function foreseen under Article 58 of the constitution.<sup>20</sup>

Consequently, such a state of affairs would infringe the special status of the environment in the legal system and would disregard the duty of the state to protect the natural wealth of the nation. The claim also argued that the declaration of the public utility of mining runs counter to constitutional tenets that uphold the constitutional rights and obligations of territorial entities to manage their interests autonomously and to regulate land use on their territories.<sup>21</sup> Although the Constitutional Court declared that it was unable to rule in this case given that the charges had been inadequately formulated (judgement C-619/2015), the claim generated debate among a range of stakeholders, who expressed their opinions alongside the positions argued by government agencies and organisations during the judicial process. The declaration of inhibition paves the way for further constitutional debate in the future, as the initial parties as well as other citizens, participate. This makes it likely that the present debate will continue under constitutional jurisdiction for years to come.<sup>22</sup>

## 5 The Local Institutions ‘Gap’

A review of developments in Colombian legislation and judicial decisions shows that sustainable development is ‘present’ in sectoral legislation: mining

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20 It is important to note that Article 58 guarantees the private property and rights that are acquired in accordance with civil laws. This article also stipulates that ‘When in the application of a law enacted for reasons of public utility or social interest a conflict between the rights of individuals and the interests recognized by the law arises, the private interest shall yield to the public or social interest. Property has a social dimension which implies obligations. As such, an ecological dimension is inherent to it. The State shall protect and promote associative and joint forms of property. Expropriation may be carried out for reasons of public utility or social interest defined by the legislature, subject to a judicial decision and prior compensation. The compensation shall be determined by taking into account the interests of the community and of the individual concerned’.

21 Lawsuit challenging the constitutionality of Article 13 of Law 685 of 2001, the Code of Mines, by which the mining industry, in all of its areas and phases, is deemed to be of public utility and social interest. See: Dejusticia, [http://www.dejusticia.org/files/r2\\_actividades\\_recurso/fi\\_name\\_recurso.702.pdf](http://www.dejusticia.org/files/r2_actividades_recurso/fi_name_recurso.702.pdf) (accessed on 2 January 2016).

22 Judgement C-619/15, <http://www.corteconstitucional.gov.co/RELATORIA/2015/C-619-15.htm> (accessed on 20 January 2016).

activity must be executed in the framework of the comprehensive concept of sustainable development enshrined in the constitution and in the law. This includes substantive commitments and obligations, as well as procedures inherent to the limits established to protect and adequately use natural resources and meet the needs of present and future generations.<sup>23</sup> This requires using management and planning tools such as EIA and territorial planning. It also implies weighing interests in the decision-making process, which entails entering into an intercultural dialogue with affected communities and agreements with territorial units to ensure that actions in different spheres of the state are coordinated and directed at achieving the common good.

From the perspective of territorial management design, Santaella Quintero (2016) contends that the proliferation of social and inter-institutional conflicts regarding the granting of mineral rights is related to the fact that mining legislation and environmental regulation, and the concurrent jurisdiction recognised under the constitution to authorities at different administrative levels (national, departmental, municipal) to manage territories and their resources are not aligned (the so-called constitutionalisation gap). Santaella Quintero also points out the fragmentation of the different legal regimes that govern each of them (the so-called legal harmonisation gap). Along these lines, he observes that placing sectoral legislation in the 'territorial toolbox' of the constitution (and in the division of powers inherent to territorial autonomy) disrupts the dynamic of 'top-down' decisions. And he argues that 'sectoral legislation should be "constitutionalised" in terms of territorial management and harmonised with other "sub-systems", taking into consideration the criteria for concurrence and the coordination of corresponding administrative orders and citizen participation in the decisions that affect the community according to the provisions of the constitution regarding the territory and its resources' (Santaella Quintero, 2016, 207, our transl.).

If we widen the geographic and temporal perspective of our analysis, we begin to wonder whether what we could call, in a broader sense, a 'local institutions gap' was not originated during the very design of the legal and institutional regime for the sector, as we pointed out at the beginning of this chapter. In terms of both the historical origins of legislation and of the reforms employed to promote the sector in the 1990s, the sectoral regime has been directed at setting stable and attractive bases for investment. Efforts directed at creating local institutions via which to strengthen decision-making processes and linkages to other productive activities have been more gradual, tenuous and fragmented.

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23 Intervention of the Department of Mining and Energy of the Universidad Externado de Colombia with reference to Judgement C-619/15 of 30 September 2015 (not published).

Foreign companies carry out their operations within this space, devoid of regulation and institutions and have often been filling the gaps with international standards and certification processes (Szablowski, 2007). The fragmentation of jurisdictional levels (both national and local) and of regulatory regimes, combined with the absence of coordination mechanisms, has heightened the chances that projects to which mineral rights have been granted will be unable to make progress towards exercising the same (such as in cases where mineral rights holders are denied environmental permits), paving the way for potential claims made to international arbitration tribunals. Thus, the question is whether legal and institutional design is sufficient to promote the role that mining can play in contributing to the objectives of sustainable development.

The next section provides a preliminary overview of the constitutional and legal framework for mining in Bolivia and poses a series of questions based on these reflections.

## 6 Bolivia: Mining in the Constitution (2009) and in the New Mining and Metallurgy Law (2014)

Both Bolivia and Ecuador evolved along a path similar to Peru's in the 1990s by adopting legal and institutional frameworks to promote and protect foreign investment. The Mining Code of Bolivia of 1997 constitutes the most rounded version of its time of mining legislation geared towards creating enabling frameworks for investment. It established a single concession system for exploration and exploitation (similar to the situation in Peru) under the sole condition of paying an annual fee, and guaranteed expropriation of surface lands.

The administration of Evo Morales, who took office in 2005, proposed a fundamental change that expressed the identity of the indigenous majority of the population and the objectives and functions of the state. The Political Constitution of the State of Bolivia of 2009 sets forth the principle of 'living well' / *suma qamaña* as the ethos for a plural society and the state's objectives and functions. *Suma qamaña* includes a series of principles with indigenous roots that anchor the constitution within the country's pluricultural identity (Villalba, 2013).

The history of Bolivia has been marked by mining, which still constitutes a strategic activity for the country. Bolivia produces tin, lead, zinc, gold, silver, tungsten and bismuth and has large deposits of lithium and iron. Mining cooperatives play an important role in the sector. The National Development Plan published in 2006 envisaged a role for the sector in a strategy of 'comprehensive



and diversified development' according to constitutional guidelines and set its programmatic bases (Bolivia, 2006).<sup>24</sup>

In terms of its constitutional structure, the Plurinational State of Bolivia is constituted as a 'Unitary Social State of Plurinational Communitarian Law, free, independent, sovereign, democratic, intercultural, decentralised and with several autonomies. Bolivia is founded on plurality and on political, economic, juridical, cultural and linguistic pluralism in the integration process of the country' (Bolivia, 2009, Art. 1). Bolivia adopts a 'participatory democratic, representative and communal form of government, with equal conditions for men and women' (Art. 11.1). In terms of economic organisation, the constitution enshrines a plural economic model (state, community, private) where the state must ensure 'development through the equitable redistribution of economic surplus in the social policies of health, education, culture, and the re-investment in productive economic development' (Art. 306.v.). Natural resources play a pre-eminent role in the state's economic organisation and in the model for a plural economy. The state must also exercise strategic control over the production of these resources and industrialisation chains. Natural resources (which include minerals in all of their states) are the '... property of the Bolivian people and shall be managed by the state' (Art. 311.2) and are considered of 'strategic character and of public importance for the development of the country' (Art. 348.11.). Activities related to non-renewable natural resources 'shall have the character of state necessity and public utility' (Art. 356).

Various constitutional clauses strengthen the direct link between the planned and responsible use of natural resources and their industrialisation and the objectives of eradicating poverty and social exclusion. The state must explicitly recognise and prioritise this, and execute policies with that purpose 'within the framework of respect for individual rights, as well as the rights of the peoples and nations' (Art. 313) and articulating 'productive development of the industrialization of natural resources' (Art. 316; also Arts 319 and 355). Industrial processes should preferably take place in the location where production originates. Revenues derived from exploitation and the industrialisation of natural resources should be distributed and reinvested to promote economic diversification at the different territorial levels of the state (Art. 355).

The constitution sets some guidelines for the role of public companies, the legal instruments for the participation of private equity companies, the incorporation of mixed enterprises, and for entering into joint venture contracts for activities involving strategic resources. In terms of foreign investment, the

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24 The Government approved a new plan through Law 786, *Plan de desarrollo económico y social 2016–2020 en el marco del desarrollo integral para vivir bien* (Bolivia, 2016).

new constitution establishes precedence of domestic over foreign investment and the precedence of Bolivian jurisdiction, laws and authorities in settling disputes (Art. 320). Bolivia withdrew from the International Centre for Settlement of Investment Disputes (ICSID)—of which it had been a member since 1991—with notice being submitted to the World Bank on 2 May 2007.

The powers of the state in terms of natural resource management are restricted by the duty of the state to ‘conserve, protect and use natural resources and the biodiversity in a sustainable manner, as well as to maintain the equilibrium of the environment’ (Art. 342; also Art. 358). The Framework Law of Mother Earth and Holistic Development for Living Well (Bolivia, 2012) establishes criteria for the use of ‘Mother Earth’s non-renewable components’. Administrative and judicial public authorities are responsible for overseeing the rights of Mother Earth in accordance with their competences.

In terms of mining and metallurgy, the constitution delves into the regime of the ownership and granting of mineral rights throughout the entire productive chain and the use of mining contracts that must fulfil a social and economic function. The Law of Mining and Metallurgy establishes the regime applicable to mineral rights and includes actions aimed at promoting the development of mining and metallurgic activities in a manner that is ‘responsible, planned and sustainable’. The law determines the institutional structure of state authorities and so-called ‘productive mining actors’ (state and private mining industry and cooperatives) and the procedures applicable to mining jurisdiction. Mining contracts require the approval of the Plurinational Legislative Assembly.<sup>25</sup> Mineral rights holders can obtain surface rights in the area stipulated by the contract or in neighbouring areas by prior agreement and upon the payment of compensation. If no agreement is reached with regard to non-public lands, administrative authorisation will be sought from the pertinent departmental or regional authority.

In addition to assuming roles as a regulator and an administrator of the resources owned by the Bolivian people, the state plays a leading role as a productive actor in the mining industry. The executive branch can set areas aside through a Supreme Decree that allows prospecting, exploration and assessment for a maximum of five years; preferably to be granted to COMIBOL.

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25 The rights and obligations derived from contracts cannot be assigned. Applications for the granting of new contracts must include work and investment plans (but not technical or financial conditions) according to Article 140. The mandatory clauses to be included in these contracts are references to work and investment plans, periodic monitoring, and stipulations relative to protecting and preserving the environment, local work forces and national services (Art. 143).

Public mining companies engage in activities involving minerals declared to be strategic, such as lithium and potassium.

### 6.1 *The Environmental Dimension*

The Mining and Metallurgy Law sets principles for natural resource use (Bolivia, 2014). The principle of ‘social responsibility’ governs ‘the use of mineral resources within a sustainable development framework with the purpose of improving Bolivians’ quality of life’. According to the principle of ‘reciprocity with Mother Earth’, ‘mining activities should adhere to the framework established in the Political Constitution of the State [Bolivia, 2009], the Framework Law of Mother Earth and Holistic Development for Living Well [Bolivia, 2012] and other applicable legal norms’ and take measures to ‘Protect Highly Vulnerable Indigenous Nations and Peoples’ (Art. 5). The Mining Law is thus subject to the limits and processes established in the Framework Law of Mother Earth.

The Mining Law establishes that promoting the comprehensive and diversified use of detrital mineral deposits shall not ‘infringe the use of water needed for life’ (Art. 12, our transl.). Another provision restricts mining near ‘headwaters, lakes, rivers and reservoirs’ and stipulates that these activities should be subject to environmental studies with a multi-sectoral focus (Art. 93.III).

### 6.2 *Territory Management and the Role of the Autonomous, Municipal, Departmental State*

The constitution stipulates that the territorial morphology of the state is unitary and decentralised and that it has autonomies (Art.1); territorially, it is organised into departments, provinces, municipalities and indigenous native peasant territories (Bolivia, 2009, Art. 269).

The central level of government has *exclusionary* competence (cannot be transferred or delegated) on matters related to hydrocarbons and with regard to the creation, control and administration of strategic public companies, and *exclusive* competence for strategic natural resources, including minerals (*exclusive* competence in that it can exercise legislative, regulatory and executive powers, but it can also transfer and delegate the last two) (Bolivia, 2009, Arts. 297 and 298). In terms of the environment, the central government’s competence is concurrent with that of the autonomous territorial entities.

The Framework Law of Autonomy and Decentralisation ‘Andrés Ibáñez’ (Bolivia, 2015), which was passed on 19 July 2010, regulates the regime applicable to autonomies according to the mandate of Article 271 of the constitution. It acknowledges the power of native peasant indigenous communities to become territorial units—if they decide to become native peasant indigenous autonomies—upon fulfilling all legal requirements. The constitution recognises that peasant indigenous autonomies can exercise self-governance

pursuant to ‘their norms, institutions, authorities and procedures’. Their establishment is based on the existence of ancestral lands and on the will of their population, expressed through prior consultation, in accordance with the constitution and the law (Bolivia, 2009, Arts. 289 and 290). These autonomies have the exclusive competence to develop and execute mechanisms for free, prior and informed consultation. The literature has observed that institutions of self-governance actually become subject, in practice, to the competence structure established by the constitution, and exhibit a remarkable influence exerted by known municipal statutes (rather than being the outcome of their ‘norms, institutions, authorities and procedures’ (Tockman, 2016; Tockman et al., 2015).

The Mining and Metallurgy Law (Bolivia, 2014) clearly establishes that as mineral resources are strategic in nature, and strategic public mining companies have *exclusionary* competence at the central government level according to the Political Constitution of the State, ‘autonomous departmental and municipal governments are not allowed to create departmental, regional and/or municipal mining units or companies and may not participate in activities involving prospecting, exploration, exploitation, benefit or concentration, smelting or refining and commercialization’. In terms of activities of ‘transformation’ of minerals and metals (a term used in the Mining Law) for industrial purposes, the central government can work with autonomous, departmental, and municipal governments through intergovernmental public companies. Autonomous, departmental, and municipal governments receive a mining royalty that respects the percentages established in said law (Bolivia, 2014, Art. 23, our transl.).

### 6.3 *Prior Consultation*

Indigenous peoples’ rights that are recognised by the constitution include the right to mandatory prior consultation—pursuant to their own procedures and institutions in a process led by the state—with regard to the exploitation of non-renewable resources in their territories (Bolivia, 2009, Art. 30.II.15). It is important to note that Bolivia was the first country to adopt legislation that recognises the United Nations Declaration of the Rights of Indigenous Peoples (Bolivia, 2007). The 2005 Hydrocarbons Law includes the right to consultation and participation and recognises a direct tax in favour of indigenous peoples (collections accrue to the Development Fund for Indigenous Native Peoples and Peasants). Supreme Decree 29033 sets the rules for prior consultation.<sup>26</sup>

26 See a detailed analysis of legislation, jurisprudence and cases of implementation in DPLF and Oxfam (2011) and Ameller et al. (2012).

The Mining and Metallurgy Law includes constitutional consultation principles. Article 19 (in the chapter on Fundamental Provisions) establishes that 'Indigenous Native Peasant Nations and Peoples have the right to participate in the profits generated by mineral resource exploitation in their territories in accordance with the regulatory mining regime notwithstanding other measures and compensation that apply under the prior consultation regime established in this Law' (our transl.). The law includes a section that contains the provisions and procedures that must be applied to the prior, free and informed consultation led by the state with 'indigenous native peasant nations and peoples, intercultural communities and the Afro-Bolivian people'. Prior consultation is a collective and fundamental right that is inherently mandatory and is a 'process of intra-cultural and inter-cultural dialogue' conducted with respect to applications for new administrative contracts during the exploitation phase of projects, whenever they might directly affect collective rights (Bolivia, 2014, Arts. 207 and 208).

By mid-2013, approximately 30 consultation projects had been undertaken relative to hydrocarbon projects. This helped develop the methodological aspects of the procedures, facilitated efforts to put together documents for public information, and generated capacities at the local level to better understand environmental and social impacts (Bolivia, 2013). Nevertheless, different sources have pointed out the difficulties that arise due to the fact that consultation processes focus mostly on compensation aspects (Bolivia, 2013; Flemmer and Schilling-Vacaflor, 2016). Findings emerging from field studies on these consultation processes also indicate their limitations with regard to reaping effective, meaningful benefits for the communities concerned. Obstacles stem from asymmetries of power, hindrances regarding communication, budget constraints (Flemmer and Schilling-Vacaflor, 2016), the short time span for executing investments in the field, and a lack of attention paid to impacts and to complaints raised (DPLF and Oxfam, 2011).

#### 6.4 *Some Reflections*

Bolivia has chosen a heterodox model to organise its economy and the constitution aims to align it with the principles of *suma qamaña*. The critical literature has observed the contradictions inherent in an economy with a strong dependence on extractive activities but with the ethos of *suma qamaña*, which extols unity between man and nature.

In the context of this chapter, we are interested in highlighting the presence of the concept of sustainable development in sectoral economic legislation, at least in constitutional and legislative texts. The new legal instruments attempt to align, in principle, their functions and objectives with sustainable

development within the processes for participation and governance established in the constitution and specific to the Bolivian context. Nevertheless, in line with the comments made in the previous section, it also seems pertinent to pose a question with regard to the extent to which the government is designing or implementing the institutional mechanisms needed to interweave the Mining and Metallurgy Law (Bolivia, 2014) and the complex territorial framework (and legal pluralism) drawn up by the constitution in order to ensure that decision-making processes are effectively anchored in sustainable development. An initial review of the literature that has observed the application of prior consultation and the efforts made to establish indigenous native peasant autonomies in the field provides a glimpse of the enormous complexity, obstacles and challenges faced when seeking to effectively ensure that the rights of the most vulnerable will be protected in decision-making processes relative to strategic economic activities (Cameron, 2013; Flemmer and Schilling-Vacaflor, 2016). This also sheds light on the need to strengthen local capacities for effective participation.

## 7 Towards Sustainable Management of Mining and Minerals?

Our study has provided a perspective on the path from sectoral regimes focused on the granting of rights and setting conditions for exploration and exploitation towards decision-making processes that require a comprehensive and inclusive look at the constitutional principles and legal frameworks applicable to managing territories and their resources. The challenges are very complex. They indicate the need to work on the gaps in the design of legal and institutional frameworks, and on strengthening the capacities of the institutions and actors that participate in decision-making for the sustainable management of resources and for ensuring that mining contributes to sustainable development at the local level. From a broader perspective, the study allows one to appreciate the enormous challenges faced when seeking to effectively anchor the principles and concepts found in international normative frameworks within the legal and political contexts and trajectories of each country.

From a legal standpoint, the principle of territorial sovereignty, as an essential attribute of the state, defines the power of each state to exercise control over the natural resources located in its territory. At the international level, the principle of permanent sovereignty of natural resources, enshrined in United Nations General Assembly Resolution 1803 in 1962, sets forth that the 'right of peoples and nations to permanent sovereignty over their natural wealth and

resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned' (UN, 1962, 1). In his classic book *Sovereignty over Natural Resources: Balancing Rights and Duties*, Nico Schrijver notes the evolution of the principle, from a political claim for the self-determination of peoples, emerging in the context of decolonisation and of the political and economic sovereignty of the period, to a principle of international law. The author points out the need to recalibrate the initial emphasis on *rights* to control natural resources towards *duties* for their use (Schrijver, 1997; also see Dam-de Jong, 2015). In this regard, the concept of sustainable development establishes guidelines, requirements and processes that place conditions on the manner in which the state exercises sovereignty over natural resources (e.g. opening spaces for dialogue and agreement in order to promote both the exercise of indigenous peoples' fundamental right to prior consultation and collaboration between different administrative bodies). The question is then whether the design of the legal and institutional framework, and the capacities to engage in processes of intercultural and interdisciplinary dialogue and of managing sustainable development are sufficient to ensure that states can effectively meet their duties within the sphere of domestic law.

Designing platforms and structures that promote the contribution of mining to sustainable development requires more than thinking from a territorial and local level alone. It also entails crystallising state policies to ensure transparency and accountability with regard to revenues, the reinvestment of revenues, and the transformation of non-renewable resources into other forms of capital (concepts that have already been explicitly or implicitly recognised in legal texts and in judicial decisions). Overall, this demands countries be actors and active participants in (and not just recipients of) regional and global processes for resource governance in order to take on the challenges raised by the SDGs for 2030.

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